(22)

No. 95-974

Supreme Court, U.S.
FILED
JUL 26 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ; JAIME P. GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT MARIA-KELLY F. YNIGUEZ

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July 26, 1996

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QUESTIONS PRESENTED FOR REVIEW

1. Do petitioners have standing to maintain this action?*
2. Is there a case or controversy with respect to respondent Yniguez?*
3. Whether a State may constitutionally impose a blanket prior restraint on non-English work-time speech by legislators, judges and all other government employees, regardless of the content, context or audience.
4. Whether an Arizona constitutional amendment which prohibits any government use of non-English languages violates the First and Fourteenth Amendment rights of Arizona citizens who are able to communicate only in a non-English language.

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* Pursuant to this Court's order of March 25, 1996.

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STATEMENT OF THE CASE

A. Yniguez' Duties in the Workplace.

Kelly Yniguez just wanted to do her job. Beginning in 1984, Kelly acted as an insurance claims manager with the State of Arizona Risk Management Division of the Department of Administration. (Y.A. 4-5) Kelly's official duties required her to administer medical malpractice claims asserted against either the State of Arizona or physicians for whom the State provided insurance on a self-insurance basis. (Y.A. 4-5)

Kelly is Hispanic and is fluent and literate in both English and Spanish. (Y.A. 5) Her language facility permitted her to directly communicate with citizens who were monolingual Spanish speakers or who did not have sufficient ability to communicate in English. (Y.A. 5-6) While performing her job, Kelly conducted interviews in Spanish with monolingual Spanish speakers concerning both medical malpractice claims and employment discrimination allegations against the State. (J.A. 45-46) Kelly used Spanish to document and communicate decisions to pay, settle or deny Spanish-speaking citizens' claims against the State of Arizona. (J.A. 46) All Spanish language documents Kelly prepared involving claims made by monolingual Spanish speakers, were accompanied by English translations. (Y.A. 17-18)

Before passage of Article XXVIII, in the course of acting as a State employee, Kelly spoke English to persons who spoke only English, Spanish to persons who spoke only Spanish and a combination of both languages to persons who were able to communicate in both. (Y.A. 5-6) Kelly communicated in both Spanish and English to those whose command of English was not sufficiently well-developed to understand all the English language expressions and ideas Kelly desired to communicate. (Y.A. 5-6) At times during her job, Kelly also communicated in Spanish to persons who spoke both English and Spanish because the emotive ideas and feelings she

desired to express were most clearly expressed in Spanish. (Y.A. 5-6) The State acknowledges that Kelly communicated in Spanish to express otherwise inexpressible concepts and ideas. (Y.A. 6)

The State stipulated that Kelly's use of a non-English language contributed to the efficient operation and administration of the State. (Y.A. 6) Indeed, the State made a binding factual admission that it had "no legitimate purpose in restricting Maria-Kelly F. Yniguez from using the Spanish language in the course of her performing government business." (Y.A. 10)

B. The Impact of Article XXVIII.

State personnel rules and loyalty oaths compel all government employees to obey the Constitution and laws of the State of Arizona. (J.A. 20-21; Y.A. 7-8) Failure to obey State laws and the Constitution subjects employees, including Kelly, to employment sanctions. (Y.A. 7-8) Kelly believed that, after the passage of Article XXVIII, State employee disciplinary rules required her to either refrain from speaking Spanish or face sanctions, and potential termination. (J.A. 52)

Not only did then-Arizona Governor Rose Mofford declare that she intended to enforce Article XXVIII, but the State stipulated that Governor Mofford "expects State service employees to comply with Article XXVIII." (Y.A. 8) These facts led Kelly to believe that she would endure sanctions if she spoke Spanish in the workplace. (J.A. 52) In addition, threatening letters from members of the public prompted Kelly to believe she would face potential lawsuits for speaking Spanish. (Y.A. 14-15) As a consequence, after Article XXVIII was passed, Kelly voluntarily stopped speaking Spanish in her workplace. (Y.A. 14-15)

C. The District Court Proceedings.

Legitimately fearing either employment sanctions or suit if she continued to use Spanish, Kelly restricted her

on-the-job vocabulary solely to English and initiated this action. (Y.A. 14-15) Pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 2000(d), *et seq.*, she sought, *inter alia*, declaratory relief. (J.A. 55-60) Kelly named Arizona's then-Governor, Rose Mofford, and Attorney General, Robert K. Corbin, and the State itself as defendants. (J.A. 56) The State was dismissed on its own Motion and Kelly amended her complaint to add State Senator Jaime Gutierrez, a bilingual State Senator representing a district with numerous non-English citizens, as a plaintiff. (J.A. 55-60)

Pursuant to Stipulation, the hearing on Kelly's Motion for Preliminary Injunction was consolidated with trial on the merits. (J.A. 2)

Senator Gutierrez testified that Article XXVIII was aimed at a segment of the Arizona population comprised of minority group members. (J.A. 78-79) He also testified that he communicated with his constituents in Spanish while performing State business. (J.A. 78-79)

Jane Hill, Ph.D., a linguistic anthropologist and State-employed professor at the University of Arizona testified without controversion and as an expert that:

a. Restricting language use results in the contraction of the full range of expression that multilingual persons have absent such restriction;

b. Article XXVIII has a disparate impact on minorities in Arizona particularly Spanish speakers and speakers of Native American languages;

c. Her occasional use of Spanish in her anthropology classroom exposes her to claims that she has violated Article XXVIII;

d. Language functions to represent emotions, manipulate social contacts, to represent aesthetic reactions and to represent personal identity; and

e. The Spanish language is an important marker of ethnic identity among Spanish speakers in Arizona.

(J.A. 80-83)

Following trial, the District Court granted Attorney General Corbin's Motion to Dismiss the Complaint against him. (J.A. 2) Finding that "Yniguez has met the requirement of an injury in fact to the extent that she asserts an injury resulting from Governor Mofford's Official Actions" the District Court entered judgment in favor of Kelly declaring Article XXVIII void as facially invalid in violation of the First Amendment. (Pet. for Cert. 106a) The District Court never reached Kelly's contentions that Article XXVIII was invalid as a denial of equal protection and due process.[1] (J.A. 200) Shortly after entry of that judgment, Governor Mofford, the only party defendant to the judgment, announced that she would not appeal the District Court's decision. (J.A. 95) Because the Governor did not appeal from the District Court's final judgment, Kelly elected not to challenge the District Court's failure to award her nominal damages at that time. (J.A. 200)

Governor Mofford's decision not to appeal prompted Arizonans for Official English and Robert D. Park (collectively, "AOE") to seek leave to intervene post-judgment for the sole and express purpose of "taking an appeal". (J.A. 95) Notwithstanding the mandate of Rule 24(c) of the Federal Rules of Civil Procedure, AOE provided no pleading setting forth the claim or defense for which it sought intervention. (J.A. 125) Shortly thereafter, and despite having successfully obtained the dismissal he had

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[1] The District Court found that "Yniguez is entitled to a judgment pursuant to 28 U.S.C. § 2201 declaring Article XXVIII unconstitutional as violative of the First Amendment. Having so found, the Court does not reach the Plaintiff's claim that Article XXVIII also violates the Fourteenth Amendment and 42 U.S.C. § 2000(d), *et seq.*" (Pet. for Cert. 111a.)

requested on behalf of both himself and the State, Attorney General Corbin sought to reinsert himself into the proceedings, substitute his wishes for the official decision of his client, Governor Mofford, and appeal the judgment to which he was not a party. (J.A. 141)

The District Court denied both motions for intervention. (J.A. 148-49) AOE and the Attorney General appealed that order to the Ninth Circuit. (J.A. 3, 150)

D. Decision on Intervention.

The Ninth Circuit reversed the District Court's denial of AOE's motion to intervene, affirmed the District Court's denial of the Attorney General's intervention motion insofar as he sought to be designated as a party to the appeal, and allowed the Attorney General to argue the constitutionality of Article XXVIII pursuant to 28 U.S.C. § 2403(b). (J.A. 183) As a part of its opinion, the Ninth Circuit noted it would retain jurisdiction over the merits of the appeal. (J.A. 183-84)

E. The Mootness Determination.

After the Ninth Circuit issued its intervention opinion on July 19, 1991, it issued a mandate on August 14, 1991. (J.A. 185) Shortly thereafter, the State filed a "Suggestion of Mootness" in the Ninth Circuit noting that Kelly had resigned from State employment on April 20, 1990. (J.A. 187) Six days after the State's filing, AOE moved the Court to recall the mandate. (Y.A. 19-27) The Ninth Circuit subsequently rejected the State's Suggestion of Mootness, noting that the proper procedure following reversal of the District Court's denial of AOE's Motion for Leave to Intervene was for AOE to file a Notice of Appeal with the District Court.[2] (Pet. for Cert. 94a-95a) In the same opinion, the Ninth Circuit denied

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[2] Thus, Kelly was entitled to file a cross-appeal of the District Court's failure to award damages.

AOE's Motion to Recall the Mandate. (Pet. for Cert. 96a) Notwithstanding the August 20, 1991 entry on the District Court docket of the Ninth Circuit's Order permitting intervention, AOE did not file a Notice of Appeal until December 3, 1992 – nearly 15 months later. (J.A. 206) Kelly thereafter filed a timely notice of cross-appeal on December 15, 1992. (J.A. 209) The State filed no appeal on the merits.

On March 16, 1993, the District Court awarded Kelly her attorneys' fees for obtaining the unappealed judgment against Governor Mofford. (J.A. 4) The State, having a statutory obligation to pay those fees, conditionally appealed the fee award. (J.A. 4, 5) The Ninth Circuit consolidated that appeal with AOE's appeal and Kelly's cross-appeal. (J.A. 8)

F. Panel Decision on the Merits.

AOE and Kelly briefed and argued the merits before the Ninth Circuit. Following oral argument, Arizonans Against Constitutional Tampering and Thomas Espinoza (collectively, "AACT") sought leave to intervene as a party plaintiff. (J.A. 14) The Ninth Circuit granted that motion on June 21, 1994. (J.A. 14) On December 7, 1994, a three-judge panel affirmed the District Court's decision on the merits, finding Article XXVIII unconstitutional in violation of the First Amendment. (J.A. 14) Shortly thereafter, the State voluntarily waived its Eleventh Amendment immunity from the award of nominal damages, moving the Court to modify its opinion consistent with the waiver. (Pet. for Cert. 59a; Y.A. 28-32)

G. The En Banc Opinion.

On re-hearing en banc, the Ninth Circuit concluded that the initial three-judge panel opinion was correct and essentially re-issued that opinion. (Pet. for Cert. 1a) The opinions recognized the State's express waiver of its Eleventh Amendment immunity to the award of nominal

damages. (Pet. for Cert. 59a) No party sought a stay of the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure. Accordingly, the cause was remanded to the District Court on October 27, 1995 and on November 7, 1995 the District Court entered its judgment awarding Kelly nominal damages in the amount of $1.00. (J.A. 211) No party appealed that judgment.

On December 20, 1995, AOE submitted its petition for writ of certiorari. This Court granted certiorari on March 25, 1996. (J.A. 212) In its Order granting certiorari, this Court specifically requested briefing and argument of the following questions:

1. Do petitioners have standing to maintain this action?
2. Is there a case or controversy with respect to respondent Yniguez?

(J.A. 212)

SUMMARY OF ARGUMENT

AOE is now the only party adverse to Kelly Yniguez in this Court. The only parties ever having a case or controversy with Kelly, however, were the State and Governor Mofford. When the Governor declined to appeal the District Court's judgment and when the State failed to appeal the nominal damages judgment against it and refused to join in AOE's petition for certiorari, the lower courts' judgments became final, and all cases and controversies involving Kelly's actions were resolved.

AOE has no standing to maintain this action. Its abstract injury – that its efforts to place an "English Only" law on the ballot were nullified – cannot be attributed to any misconduct by Kelly. AOE is simply philosophically opposed to the District Court's decision. No matter how passionate its interest in urging the validity of Article XXVIII, AOE does not have a concrete interest or direct stake in the outcome of this litigation. It, therefore, does not have sufficient standing to support a petition for certiorari.

This case is presented to this Court as a Section 1983 case without a state actor. 42 U.S.C. § 1983 creates a remedy, enforceable by citizens, for violations of federal rights committed by persons acting under color of state law. The State and its officials were the only persons against whom Kelly sought or obtained relief. AOE was not, and could not have been, a party to the Section 1983 action Kelly initiated in District Court. Without a state party, AOE has no standing to pursue this case.

Neither the State nor AOE briefed the issue of this Court's question of whether a case or controversy exists with respect to Respondent Yniguez. Instead, both argue that Kelly's resignation from State employment – after the unappealed judgment against Governor Mofford became final and binding – rendered this case moot. The unappealed judgment for nominal damages in Kelly's favor, however, insulates this action from mootness.

This Court has long-held that nominal damages are appropriate in civil rights cases where absolute rights are violated. The District Court specifically held that Kelly suffered an "injury in fact . . . resulting from Governor Mofford's official actions", yet it failed to award her nominal damages. Kelly's injuries, however, fully qualified her for an award of nominal damages and she filed a timely cross-appeal. As a result, Kelly's claim for nominal damages was viable even after her resignation.

Both AOE and the State assert that all lower courts' decisions should be vacated due to lack of standing or mootness. Vacatur is not justified in this case. The District Court awarded Kelly a final binding judgment against Governor Mofford. That judgment is final and binding because the Governor never appealed. It cannot be vacated.

In addition, the Ninth Circuit opinion cannot be vacated – even if AOE had no standing to intervene or appeal. A viable case or controversy existed between

Kelly and the State throughout the Ninth Circuit proceedings. Under 28 U.S.C. Section 2403(b), the State maintained a justiciable interest in the merits at the Ninth Circuit. The State expressly waived its immunity in connection with the District Court's award of nominal damages. Later, it did not appeal from the judgment awarding those damages. Moreover, the State neither petitioned this Court for a writ of certiorari nor joined in AOE's petition. Instead, it acquiesced in the Ninth Circuit's ruling. As a result, Kelly has a final unappealed judgment against the State for her award of nominal damages. Neither of the lower courts' decisions may be vacated because the State parties bound by those decisions did not appeal. The equitable doctrine of vacatur is not available to those who voluntarily forego traditional appellate remedies.

The issue on the merits is how far a government may go in repressing settled First Amendment rights – in particular, elected officials' rights to communicate with their constituents. The plain language of Article XXVIII demonstrates the breadth of its prohibitions. It precludes elected and appointed officials from selecting the language they deem appropriate to perform their jobs. Its restrictions affect legislators, judges, and elected officials, as well as every clerical and administrative State employee.

Article XXVIII is a content-based prior restraint. It is therefore subject to strict scrutiny. At the very least, however, this Court should apply the heightened balancing test it established last year in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995). Under the *NTE* test, the Court must evaluate both the government employee's interests in communicating freely as well as the interests of possible recipients of those communications. The record establishes that any interests AOE asserts are substantially outweighed by the government speakers' First Amendment rights and the recipients' rights to receive their communications.

Even if this Court applies the less-stringent balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), Article XXVIII fails to pass constitutional muster. AOE simply has nothing to place on the scales in support of the government's interest in efficiency. Not only did the State stipulate that Kelly's use of Spanish contributed to the efficient operation and administration of the State, but no evidence in the record suggests that Article XXVIII aids the State's efficiency in any manner. Indeed, the State admitted that it had "no legitimate purpose" in restricting Kelly's use of Spanish on the job.

In addition to alleging Article XXVIII's First Amendment infirmities, Kelly argued in the District Court that Article XXVIII violates the Fourteenth Amendment. Although the District Court limited its analysis to First Amendment issues, this Court may view Article XXVIII's flaws under the Fourteenth Amendment as well. Article XXVIII imposes a broad and indiscriminate disability on non-English speakers. The only apparent motive for its existence is to demonstrate an intolerance for non-English speakers and to limit their participation in State government. Article XXVIII offends the Fourteenth Amendment and its promises of equal protection under the Constitution.

ARGUMENT

I. AOE HAS NO STANDING TO MAINTAIN THIS ACTION

A. AOE Lacks Article III Standing.

AOE is not bound by the District Court's judgment. The only defendant subject to the judgment is then-Governor Mofford. Yet she chose not to appeal and has not been a party to these proceedings for more than six years. After successfully intervening under 28 U.S.C. § 2403(b) for purposes of arguing constitutionality, the only government opponent on appeal was the State of Arizona. But the State chose not to join in the petition for writ of

certiorari and voluntarily "acquiesced in [the] holding" of the Ninth Circuit. (AZ Brf. at 25.) As a consequence, AOE stands before this Court as the only intervenor seeking review. AOE must therefore meet traditional standing requirements. *See, e.g., Fisher v. Tucson Sch. Dist. No. 1*, 625 F.2d 834, 837 n.1 (9th Cir. 1980) ("While a party need not meet all of the traditional standing requirements in order to intervene in an action, these become necessary if he is the only appellant. . . . "); *Legal Aid Soc'y of Alameda County v. Brennan*, 608 F.2d 1319, 1328 n.9 (9th Cir. 1979), *cert. denied, Chamber of Commerce v. Legal Aid Soc'y of Alameda County*, 447 U.S. 921 (1980) ("Since the federal defendants have acquiesced in the judgment against them, appellants must demonstrate such a stake in the outcome of an appeal that a live Article III case or controversy remains for appellate resolution.").

This Court has observed that standing involves constitutional limitations on federal court jurisdiction:

> [i]n its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . . . "

Warth v. Seldin, 422 U.S. 490 (1975) (emphasis in original; citations omitted).

Addressing the case or controversy requirements of Article III standing, this Court has recognized an "irreducible minimum":

> (1) an injury in fact;
> (2) a causal relationship between the injury and the challenged conduct; and
> (3) a likelihood that the injury will be redressed by a favorable decision.

United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529, 1533 (1996). Independent limitations on an association's standing were set forth in *Hunt v. Washington State Apple Advertising Comm'n*:

> we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

432 U.S. 333, 343 (1977).

The first prong of the *Hunt* associational standing test is grounded in Article III's constitutional requirement of a case or controversy. *Warth*, 422 U.S. at 511. Thus, for AOE to maintain this action, it must first demonstrate that each of its members has a personal stake in the outcome of this controversy – that is to say they each suffer some actual or threatened injury due to Kelly's conduct. *See Hunt*, 432 U.S. at 343. This AOE cannot do.

Furthermore, AOE's only stated purpose was to have Article XXVIII on the ballot and promote its passage. (J.A. 97) AOE has never asserted or proven an organizational interest in *enforcing* Article XXVIII. It simply cannot meet associational standing requirements.

The only injury AOE alleges is that the declaratory relief invalidating Article XXVIII as between Kelly and Governor Mofford rendered "for naught" the labors and resources it expended to promote the Article. The District Court readily rejected that argument:

> [t]he court does not believe under these circumstances that the mere fact that an organization is a proponent of an initiative proposition and has an abstract concern that is affected by the adjudication, is sufficient to create the concrete injury necessary for non-representational organizational standing. (J.A. 145)

The District Court was well supported in its determination. *Gladstone, Realtors v. Village of Belwood*, 441 U.S. 91, 99-100 (1979); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226-27 (1974) (holding that plaintiffs did not have standing to sue either as citizens or taxpayers for declaratory relief establishing that membership in the Armed Forces Reserve constituted an office prohibited to members of Congress under the Constitution).

Here, the only concrete case or controversy was between Kelly and Governor Mofford. When the Governor refused to appeal and the State intervened to argue the constitutionality of Article XXVIII, the case or controversy shifted from Kelly and the Governor to Kelly and the State. At no time did Kelly seek any relief against AOE. Likewise, AOE never sought relief against Kelly. Even the abstract "injury" AOE purportedly suffered – that its efforts were nullified – is not attributable in any way to any alleged misconduct by Kelly. No matter how passionate AOE's interest in urging that Article XXVIII is valid, that interest does not equate to the standing necessary to support this action. *See Diamond v. Charles*, 476 U.S. 54, 62 (1986).

In *Diamond*, a physician who had properly intervened in the trial court petitioned this Court to review the trial court's determination (affirmed by the Seventh Circuit)

that portions of the Illinois Abortion Law of 1975 were unconstitutional. The State of Illinois chose not to appeal those adverse determinations, despite the fact that its own statute was at stake. This Court refused to grant standing to the physician proponent of the statute:

> [b]ecause a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense, we dismiss the appeal for want of jurisdiction.

476 U.S. at 56. Indeed, relying on the "case or controversy" requirement of Article III of the Constitution, this Court declared:

> [t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements. This court consistently has required, in addition, that the party seeking judicial resolution of a dispute "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of the other party.
>
> * * *
>
> The decision to seek review must be placed "in the hands of those who have a direct stake in the outcome". It is not to be placed in the hands of "concerned bystanders" who will use it simply as a "vehicle for the vindication of value interests."

Id. at 62. (citations omitted) *Diamond* established that a simple philosophical interest in the outcome of litigation is insufficient to confer standing. AOE, therefore, must show both a concrete interest and a direct stake in the outcome of the litigation. It, however, has neither. AOE cannot even satisfy its burden of demonstrating that there is some injury which is likely to be redressed by a favorable decision. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). All it has is the abstract desire that this Court validate Article XXVIII as written. (J.A. 97) In the

absence of any other defendant, AOE is simply unable to demonstrate the standing necessary to permit it to seek review of the judgments and decisions below.

B. In Addition to Its Inability to Meet the "Case or Controversy" Requirements of Article III, AOE's Position Contravenes Prudential Limitations on Standing as Well.

This Court best described prudential limitations on standing in *Gladstone, Realtors*:

> [e]ven when a case falls within these constitutional boundaries, [i.e., the plaintiff has personally suffered some actual or threatened injury due to the putative conduct of the defendant giving rise to an Article III case or controversy] a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights will be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim. For example, a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than "shared in substantially equal measure by all or a large class of citizens."

441 U.S. at 99-100 (citation omitted).

Here, AOE's claim that it is injured – because the District Court's judgment nullified its members' votes – is shared in substantially equal measure by the majority of Arizona citizens who cast a ballot on the initiative. AOE can predicate its standing neither upon an interest in the establishment of legal precedent nor upon the possibility that the declaratory relief could adversely affect AOE's interest. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982); *In re Benny*, 791 F.2d 712, 721 (9th Cir. 1986). Under the circumstances, this Court's prudential limitations on

standing compel the conclusion that AOE may not properly pursue this action.

AOE also failed to file a separate pleading as required by Rule 24(c) of the Federal Rules of Civil Procedure. Courts have held such a failure to be fatal. *Miami County Nat'l Bank v. Bancroft*, 121 F.2d 921, 926 (10th Cir. 1941); *LeBrect v. O'Hagan*, 394 P.2d 216, 217 (Ariz. 1964). Post-judgment intervenors have an obligation to set forth their interests with clarity to permit courts to ascertain whether they have established some concrete interest or right which will not be adequately protected or enforced unless intervention is granted. *Hobson v. Hansen*, 44 F.R.D. 18, 25 (D.D.C. 1968).

Here, AOE filed no pleading articulating how it was injured by Kelly's actions or the District Court's judgment. It made no claims and asserted no defenses to Kelly's complaint. The information AOE provided Kelly and the courts concerning its interest demonstrated that it is simply philosophically opposed to the District Court's judgment. Who AOE's members are, what their interests are, and how they are purportedly impaired by the District Court's judgment are unknown.

Moreover, because Kelly never spoke Spanish or otherwise violated Article XXVIII after its adoption, AOE could not have properly sued her even under the private right of action granted in Section 4 of the Article. AOE's wholesale failure to allege, and inability to prove, any particularized injury is fatal to its standing.

C. AOE's Status as an "Initiative Proponent" Does Not Confer Standing.

AOE urges that, as the principal sponsor of the initiative proposing Article XXVIII, it has independent standing to maintain this action. (Pet. Brf. 41-42) Notwithstanding the State's absence, AOE contends that its status as an initiative proponent alone is sufficient to

satisfy Article III's case or controversy mandate. According to AOE, it stands in a position analogous to a legislator defending its legislation from constitutional attack. (J.A. 166-68) Under scrutiny, however, this analogy disintegrates.

Citizens elect representatives to enact legislation on their behalf. Arizona's citizens neither elected AOE's members nor charged them with the duty of proposing any initiative. Moreover, Arizona law did not authorize AOE to defend the initiative from attack, nor did the people elect AOE to do so. The mere fact that AOE proposed an initiative does not cloak it with any special standing to defend that initiative in court. *See Diamond v. Charles*, 476 U.S. 54 (1986)

Although AOE suggests that this Court has previously "recognized initiative proponents as representatives to defend the statutes they proposed," the cases it cites do not support that proposition – at least insofar as Article III standing is concerned. (Pet. Brf. 43) In both *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), a state party with incontrovertible Article III standing remained a party to the appellate proceedings. As a consequence, it was not necessary for the initiative proponents themselves to independently satisfy Article III's case or controversy mandate. *Crawford v. Board of Education*, 458 U.S. 527 (1982), dealt not with associational standing to defend a ballot initiative, rather it involved a class action suit brought by minority students subject to mandatory busing orders. AOE does not cite any case where this Court has directly held that an organization's status as an initiative proponent is sufficient to confer Article III standing on that organization to defend its initiative. In fact, the opposite appears to be true.[3] AOE's

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[3] *See The Don't Bankrupt Washington Comm. v. Continental Ill. Nat'l Bank and Trust Co. of Chicago*, 460 U.S. 1077 (1983). There,

status as an initiative proponent does not meet the standing requirements constitutionally imposed by Article III.[4]

II. THERE IS NO JUSTICIABLE CASE OR CONTROVERSY BETWEEN MS. YNIGUEZ AND AOE.

Throughout the trial and appellate phases of this case, there was a concrete case or controversy between the State (including Governor Mofford) and Kelly. The controversy with respect to the declaratory relief Kelly sought ended when Governor Mofford did not appeal and the District Court's judgment became final. (J.A. 93)

A. Because AOE Was Never A Party to the Judgments, It Has No Right to Appeal.

AOE intervened in this proceeding after the District Court rendered its judgment against Governor Mofford. AOE did not seek to amend the judgment to become a party thereto. It is not a party to any judgment. Nor is it bound by any judgment. AOE, therefore, may not appeal the District Court's judgment.[5] *See United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917) (holding that a state which sought post-judgment intervention was not a party to the record in the trial court and could not appeal the judgment); *see also Karcher v. May*, 484 U.S. 72 (1987)

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this Court determined that proponents of a state initiative that had been declared unconstitutional as a violation of the Contracts Clause lacked standing to appeal where the state acquiesced in the holding that the initiative was unconstitutional.

[4] In contrast, Respondent AACT's members include Arizona legislators and State employees whose individual rights are directly impacted by Article XXVIII.

[5] Even if it were entitled to appeal, AOE did not do so until nearly 15 months after the mandate issued permitting their appeal. Thus, AOE's appeal was untimely in any event.

(finding that one who is not a party or has not been treated as a party to a judgment has no right to appeal).

Where a state fails or declines to appeal and the case or controversy between the state and a citizen ends, no other person is able to continue the litigation by petitioning for certiorari. *Diamond v. Charles*, 476 U.S. 54 (1986); *see also Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789-90 (6th Cir.), *cert. denied*, 434 U.S. 852 (1977) (holding that where a party to a judgment fails to appeal, the judgment is unassailable). As a result, AOE is an inappropriate party in this proceeding.

B. AOE Is Not, and Has Never Been, A Person Acting Under Color of State Law with Respect to the Subject Matter of Ms. Yniguez's Complaint.

42 U.S.C. § 1983 creates a remedy, enforceable by citizens, for violations of federal rights committed by persons acting under color of state law. The elements of a Section 1983 action are (i) a person acting under color of State law; (ii) a deprivation of rights, privileges or immunities under the Constitution and laws affecting the complainant; and (iii) such deprivation must be caused by the person acting under state law. *Howlett v. Rose*, 496 U.S. 356, 358 n.1 (1990); 42 U.S.C. § 1983.

In this Section 1983 case, the State and its officials were the only persons against whom Kelly sought or obtained relief. Kelly's complaint stated no claim or cause of action against AOE or any of its members. It alleged no illegal conduct on the part of AOE and sought no relief against AOE. Similarly, AOE has never alleged that Kelly violated Article XXVIII and it has never sought relief against Kelly under Article XXVIII.

AOE's endorsement of Article XXVIII and its activities in urging its adoption were no more than private activity. Section 1983 does not give private persons such

as Kelly a cause of action against other private citizens who are acting solely in their private capacities without a jointly engaged State official. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (holding that no Fourteenth Amendment state action and no Section 1983 cause of action exists against private conduct even though such conduct may abridge individual rights); *see also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978) (finding that the "total absence of overt official involvement" precludes a party from maintaining a Section 1983 action). From its outset to its conclusion in the Ninth Circuit, the only case or controversy in this proceeding was between Kelly and State officials.

III. ALTHOUGH ARIZONA'S BRIEF ARGUES MOOTNESS (AN ISSUE THIS COURT DID NOT RAISE), MS. YNIGUEZ'S CLAIMS ARE NOT MOOT.

Neither AOE nor the State addressed the second question this Court posed in granting certiorari. Instead of confronting the issue of whether a case or controversy exists with respect to Respondent Yniguez, both AOE and the State raise a "mootness" argument relating to Kelly's post-judgment resignation from state employment *after* Governor Mofford's appeal time expired.[6]

AOE concedes what this Court's decisions specifically implicate, that Kelly's damages claim is sufficient to preclude mootness. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989); (Pet. Brf. 48-49) In contrast, the State urges that, notwithstanding the unappealed final District Court judgment awarding Kelly nominal

[6] Pursuant to 28 U.S.C. § 2403(b), the *only* matter properly presentable by the State in this proceeding is argument on the constitutionality of Article XXVIII. Ironically, constitutionality is left untouched by the State's brief.

damages, this action is nevertheless moot.[7] (J.A. 211) The State's argument is threefold. First, the State essentially contends that Kelly suffered no injury, and therefore was not entitled to nominal damages. Second, the State argues that Governor Mofford in her official capacity was immune from a suit for damages, including nominal damages. Finally, the State suggests that Kelly's nominal damages claim was only incidental to her claim for declaratory relief and hence is insufficient to avoid mootness. None of these arguments withstands analysis.

The District Court directly held that Kelly suffered an "injury in fact to the extent she asserts an injury resulting from Governor Mofford's official actions." (Pet. for Cert. 102a) As a consequence, she was given declaratory relief. This Court has long recognized that nominal damages are appropriate in civil rights cases where absolute rights are violated:

> [c]ommon-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed. . . .

Carey v. Piphus, 435 U.S. 247, 266 (1978). The injury Kelly suffered was of a type this Court has held entitles her to an award of nominal damages. The State's argument to the contrary must be rejected.

The State's second contention is no more viable. While Governor Mofford may not have been amenable to a suit for damages in her official capacity, she was a

[7] Arizona had an interest in the monetary award because it has a statutory duty to indemnify state officials for acts in the course of State employment. A.R.S. § 41-621(A)(3).

proper individual defendant under the *Ex Parte Young*[8] doctrine, and the District Court expressly so found. (Pet. for Cert. 100a) As such, she was personally susceptible to liability for damages. Further, the State expressly waived its immunity with respect to Kelly's nominal damages claim. Further, the State did not appeal from the District Court's judgment awarding Kelly nominal damages. As a consequence, any argument premised on the impropriety of nominal damages has been waived. *See Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789-90 (6th Cir.), *cert. denied*, 434 U.S. 852 (1977).

The State's final argument, that Kelly's nominal damages claim is only "incidental" and cannot support Article III standing, is based exclusively on a disingenuous interpretation of *Alejandrino v. Quezon*, 271 U.S. 528 (1926). *Alejandrino* does not stand for the proposition that if a damage claim is "incidental" to a declaratory relief claim, the damage claim cannot avoid mootness. Rather, it simply holds that a party cannot avoid mootness when the only potential claim remaining is not well pled and is indeterminate. *Id.* at 534-35; *see also Powell v. McCormack*, 395 U.S. 486, 498 (1969) (stating that *Alejandrino* does not stand for the proposition that damages are insufficient to prevent an issue from becoming moot). This Court, and virtually every other federal court, recognizes that the existence of claims for nominal damages obviates mootness. *See Lokey v. Richardson*, 600 F.2d 1265, 1266 (9th Cir. 1979), *cert. denied*, 449 U.S. 884 (1980); *see also Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 442 (1984) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.")

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[8] 209 U.S. 123 (1908).

IV. VACATUR OF ANY OF THE UNDERLYING DECISIONS IS INAPROPRIATE

Both the State and AOE assert that, in the event of lack of standing or mootness, *all* lower court decisions should be vacated. (Pet. Brf. 47; AZ Brf. 34-35) This assertion both ignores the procedural history of this case and defies the rationale of *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994). Application of *U.S. Bancorp's* analysis to this case compels the conclusion that the "extraordinary remedy of vacatur"[9] is not justified in any regard.

Governor Mofford's refusal to appeal from the District Court judgment against her is of fundamental importance to any vacatur analysis. That judgment became final and effective as to Governor Mofford and her successors insofar as Kelly is concerned. As the Ninth Circuit noted in *Yniguez I*:

> [t]here is no dispute that the declaration that Article XXVIII is facially invalid binds Governor Mofford and her successors in any actions against Ms. Yniguez.

(J.A. 177) This final judgment, which was unappealed and became binding long before Kelly left state employment, is not properly subject to the equitable doctrine of vacatur.

A case or controversy nonetheless existed between Kelly and the State throughout the Ninth Circuit proceedings. By way of the Ninth Circuit's order regarding 28 U.S.C. § 2403(b), the State maintained a justiciable interest in the merits.[10] On November 7, 1995, the District

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[9] *U.S. Bancorp*, 115 S. Ct. at 392.

[10] Kelly has consistently argued that AOE had no standing to appeal the District Court's judgment. AOE's lack of standing however, does not require vacatur of the Ninth Circuit's

Court vindicated Kelly's right to nominal damages by entering judgment in her favor. (J.A. 211) Not only did the State expressly waive its immunity in connection with the award of nominal damages (Y.A. 28-32; Pet. for Cert. 59a), it did not appeal from that judgment. That judgment is binding and final insofar as the State is concerned. Moreover, the State neither petitioned this Court for a writ of certiorari nor joined in AOE's petition. This failure results in a binding and final judgment between the State and Kelly. *See Federated Dept. Stores, Inc. v. Martin*, 452 U.S. 394, 400 (1981) (holding that the doctrine of res judicata applies when "it is apparent that [a party has] made a calculated choice to forgo [its] appeal[ ]"). Instead, the State "decided to acquiesce" in the Ninth Circuit's ruling. (AZ. Brf. 26.) Thus, the record convincingly demonstrates both Governor Mofford's and the State's conscious determinations to eschew judicial review of the judgments against them. The State's current effort to collaterally attack these judgments through misuse of vacatur should not be countenanced.

This Court noted in *U.S. Bancorp.* that the equitable tradition of vacatur places the burden on a supplicant for that relief to demonstrate its right to invoke the doctrine, and that it is generally inapplicable where a party has failed to appeal:

> Respondent won below. It is petitioner's burden as the party seeking relief from the status quo of the appellate judgment, to demonstrate. . .

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opinion. Under 28 U.S.C. § 2403(b), the State had standing – independent of AOE – to pursue an appeal of the District Court's ruling on the merits. *See Maine v. Taylor*, 477 U.S. 131, 136 (1986); *see also Ruotolo v. Ruotolo*, 572 F.2d 336, 338-89 (1st Cir. 1978) (holding that the government may go forward with litigation in its own right under 28 U.S.C. § 2403(b) when it has an "independent source of authority permitting it to sue on behalf of itself").

> equitable entitlement to the extraordinary remedy of vacatur. Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been.

115 S. Ct. at 392. This Court reasoned that judicial review, not vacatur, is the appropriate methodology to avoid the effect of adverse judgments:

> Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would – quite apart from any considerations of fairness to the parties – disturb the orderly operation of the federal judicial system.

Id.

Here, the State consciously elected not to appeal from the nominal damage judgment or petition for a writ of certiorari on the merits. For purposes of vacatur, the State's actions epitomize "the lack of equity of a litigant who has voluntarily abandoned review." *See id.* at 244. The lower court's decisions should not be disturbed.

V. THE OVERBREADTH OF ARTICLE XXVIII.

This case does not involve the creation of new rights. Nor does this case involve the expansion of existing rights. Instead it confronts the question of how far a government may go in repressing settled First Amendment rights.

The plain language of Arizona's "English Only" amendment underscores the enormous breadth of its reach. It insists that "[t]his State and all political subdivisions of this State shall act in English *and in no other language.*" (Y.A. 2) Its prohibitions apply to communications by "all government officials and employees during the performance of government business." (Y.A. 1) It precludes elected and appointed officials from selecting the language they deem appropriate to perform their jobs. It restricts legislators, judges, and elected officials, as well as every clerical and administrative employee of the State. Indeed, on its face Article XXVIII even forbids the government from using Arizona's official motto, *Ditat Deus*[11] during the course of its business.

The First Amendment is the caretaker of free speech. It protects both the speaker's right to be heard and the recipient's right to receive a message. Article XXVIII spurns those rights. The lower courts properly struck it down.

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[11] Ditat Deus, which is displayed on the Arizona state seal, is Latin for "God Enriches." Among other things, it appears on state publications, proclamations, licenses, and letterhead.

VI. STANDARD OF REVIEW.

A. Article XXVIII Is A Prior Restraint On Speech Content – As Such, It Is Subject To Strict Scrutiny.

The government cannot promote speech it deems valuable and suppress speech it deems less valuable. The content of speech, therefore, enjoys special constitutional protection. *See, e.g., Near v. Minnesota, ex rel. Olson*, 283 U.S. 697, 707 (1931); *Lind v. Grimmer*, 30 F.3d 1115, 1119 (9th Cir. 1994); *see also 44 Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1514 (1996) (stating that "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends"). Speech restrictions singling out the content of a message are subject to strict scrutiny. Viewed under this most exacting standard, a content-based restraint will survive only if it is narrowly drawn and necessary to protect a compelling state interest. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

When a government bans the use of certain languages, it restricts the content of speech. *Asian American Bus. Group v. Pomona*, 716 F.Supp. 1328, 1330 (C.D. Cal. 1989) (holding that because "language used is an expression of national origin, culture and ethnicity, regulation of . . . language is a regulation of content"). The language a speaker chooses and the nuances that language contains are inherent elements of communication. (Y.A. 7; J.A. 81) Therefore, when a government selects the words it permits people to use to communicate ideas, it regulates content. *Aids Action Comm. v. Massachusetts Bay Transp. Authority*, 42 F.3d 1, 9 (1st Cir. 1994) (finding that a regulation that "limits the universe of words the speaker may select" is content-based).

Article XXVIII goes further still. It also acts as a prior restraint. It chills government employee speech on all levels, including speech that informs the public about the

political process, government wastefulness, and misconduct by public officials. These subjects lie near the core of the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964) ("[O]rder cannot be secured merely through fear of punishment for its infraction; [ ] it is hazardous to discourage thought, hope and imagination; [ ] repression breeds hate; [ ] hate menaces stable government; [and] the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . . ") Consequently, Article XXVIII is subject to the most critical analysis.

B. At the Very Least, The Heightened Balancing Test Established in *United States v. National Treasury Employees Union* Applies to This Case.

Last year this Court articulated a test to evaluate non-content-based *ex ante* restrictions which merely deter (rather than ban) public employees' speech. In *United States v. National Treasury Employees Union* ("NTE"), this Court declared that prior restraints on speech create such sweeping impediments that they must be held to a higher standard than *post hoc* restrictions.[12] 115 S. Ct. 1003, 1013 (1995). When the government seeks *ex ante* regulation of employee speech, it shoulders a heavy burden. In such cases, courts must balance not only the interests of the employee in communicating freely, but also the interests of future employees and possible recipients of present and future communications:

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[12] The standard balancing test courts use to evaluate employee speech *post hoc* was established in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). The *Pickering* test weighs the interest of the employee in speaking on matters of public concern against the government's interest in promoting efficiency.

> the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of **both potential audiences and the vast group of present and future employees** in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the Government.

Id. at 1014 (emphasis added; citation omitted).

Even if Article XXVIII were not content-based, it nonetheless is an *ex ante* ban that chills public employees' speech. As a consequence, and at a minimum, the *NTE* test applies to this case. Under that test, AOE must establish that the State's interest in efficient operation outweighs the interests of both potential audiences as well as present and future government employees in present and future expression. *Id.* In light of the uncontroverted record, this is a burden AOE cannot meet.

VII. ARTICLE XXVIII FRUSTRATES THE FIRST AMENDMENT RIGHTS OF LEGISLATORS, JUDGES, AND OTHER GOVERNMENT EMPLOYEES.

Elected officials are government employees. Because they are obligated to communicate with their constituents, legislators' "core speech" is given the widest latitude. *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). A legislator expresses opinions and disseminates and receives information from constituents during the course of government employment. Any restriction on that expression and communication directly conflicts with the guarantees of the First Amendment. *Id.* Yet Article XXVIII limits a legislator's choice of words to those available in a single, sanctioned language. Judge Brunetti focused on this flaw in his concurrence to the Ninth Circuit opinion:

> Article XXVIII offends the First Amendment not merely because it attempts to regulate ordinary speech, but because it attempts to manipulate the political process by regulating the speech of elected officials. Freedom of speech is the foundation of our democratic process, and the language restrictions of Article XXVIII stifle informative inquiry and advocacy by elected officials. By restricting the free communication of ideas between elected officials and the people they serve, Article XXVIII threatens the very survival of our democratic society.

(Pet. for Cert. 62a-63a)

Article XXVIII interferes with legislators' abilities to communicate with their constituents. Arizona not only has a large Hispanic population, but a significant Native American population as well. Ironically, under Article XXVIII non-English-speaking citizens may be unable to freely communicate with elected representatives when those officials may have been elected, in part, because of their abilities to communicate with constituents in non-English languages.

Article XXVIII also restricts the language choices of judges. No matter what language best conveys judges' ideas, under Article XXVIII, they will be required to limit their vocabularies to those words which are acceptable. Article XXVIII forbids judges from using phrases like "per stirpes," "res ipsa loquitur," or, for that matter, "Kulturkampf".[13] There are few government activities more official than the orders and opinions judges issue. Under Article XXVIII, they must conform to, and suffer the communicative restrictions imposed by, the government's officially-sanctioned language standards. Article XXVIII does not pass constitutional muster.

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[13] *Romer v. Evans*, 134 L. Ed. 2d 855, 868 (1996) (Scalia J., dissenting).

VIII. THE GOVERNMENT'S RIGHT TO COMMUNICATE IN A CHOSEN LANGUAGE MUST BE BALANCED AGAINST THE RIGHTS OF ITS EMPLOYEES AND THE RECIPIENTS OF THE COMMUNICATION.

A. The Government Does Not Have An Unfettered Right to Script the Speech of its Employees.

While it is true that the government "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted" by recipients of public funds, Article XXVIII is an inappropriate vehicle for ensuring a clear and undistorted government message. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2519 (1995). The record below establishes that Kelly spoke Spanish to Spanish-speaking citizens, English to English-speaking citizens, and a combination of the two languages to bilingual citizens. (Y.A. 5) Kelly's use of Spanish ensured that the recipients of the government's message understood the government's communication. In many cases, Article XXVIII's English-only mandate would result in a garbled-message to a non-English speaking recipient.[14] Article XXVIII would only increase

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[14] Kelly has never argued that citizens (or State employees) may compel, or prohibit, the state from communicating in particular language. On the contrary, she simply argues that State employees should not be precluded from communicating with non-English-speaking citizens if the employees are fully capable of accurately conveying the State's message at no additional cost or inconvenience. *See* Scott H. Angstreich, Note, *Speaking in Tongues: Whose Rights at Stake? Yniguez v. Arizonans for Official English*, 19 Harv. J. L. & Pub. Pol'y 634, 640-41 (1996).

confusion. It is not a "legitimate" means for ensuring the clarity of the State's message. (Y.A. 10)[15]

In *Rust v. Sullivan*, this Court recognized that the government has broad – though not unlimited – power to regulate the government-subsidized speech of private parties. 500 U.S. 173, 193 (1991). AOE, however, would stretch the *Rust* holding much farther. AOE claims that *Rust* empowers the government to speak in any manner it chooses, no matter how garbled or incomprehensible the message becomes. But *Rust* is narrower. In that case, this Court focused on government-subsidized speech by private parties carrying out government programs. Among other things, this Court noted that the speech restrictions at issue were acceptable because the affected subsidy recipient was not compelled to operate under the government program and citizens could receive the restricted information elsewhere. 500 U.S. at 199 n. 5. This case is distinct from *Rust*. It does not involve government subsidies of private programs. To the contrary, it directly involves both State government and State government programs. In this case, recipients of government services have nowhere to turn for government information except to people like Kelly. This case does not involve the alternatives and choices that were so important to this Court's analysis in *Rust*.

AOE also distorts the holding in *Rosenberger*. Like *Rust*, *Rosenberger* involved government-subsidized speech. In determining that the governmental restriction at issue violated the First Amendment, this Court stated that "[t]he government must abstain from regulating

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[15] It is worth noting the AOE's "clarity of governmental messages" argument is new. AOE urged adoption of Article XXVIII to avoid "tension and division" and to "encourage non-English speakers to familiarize themselves with the language." (J.A. 28-29)

speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." 115 S. Ct. at 2516. Here, the record demonstrates that Article XXVIII was intended to impact on minority group members. It is squarely contrary to the First Amendment.

Article XXVIII goes far beyond restricting only government speech or government messages. It restricts the entire vocabularies of those who do not speak the language of the majority. It greatly transcends the restrictions at issue in *Rust* and *Rosenberger*. The Ninth Circuit correctly determined that it is constitutionally overbroad.

B. Public Employees Have First Amendment Rights During the Course of Their Employment.

This Court has repeatedly held that government employees do not forfeit their First Amendment rights by virtue of their employment. *E.g., Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979). A public employee's public and private communications are not *per se* exempt from First Amendment protection. *See id.* (stating that "a public employee [does not] forfeit[ ] his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly"); *Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988) (holding that communications made in the course of a public employee's duties are not *per se* exempt from constitutional protection).

Article XXVIII unambiguously restricts speech that involves public employees' private and non-private communications in the course of their duties. Under varying circumstances, such speech achieves First Amendment protection.

Government employees are afforded First Amendment protections when they speak about non-private issues during the scope of their duties. *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir. 1995). In *Johnson*, a county government employee was fired for "blowing the whistle" on her supervisors. The Ninth Circuit determined that the plaintiff's allegations of misconduct and misappropriation within her department involved important public concerns that warrant First Amendment protection. *Id.* at 425. Similarly, in *Roth v. Veteran's Admin.*, the Ninth Circuit determined that a whistle-blower's criticisms, which were communicated to his superiors and administrative personnel, were protected because the employee was hired, in part, for the purpose of acting as a troubleshooter. 856 F.2d 1401, 1406 (9th Cir. 1988). In *Rookard v. Health and Hosp. Corp.*, the Second Circuit likewise determined that a nursing director for a municipal hospital had a First Amendment right to speak out on issues related to hospital procedure because "as Director of Nursing, **it was her duty to do as she did**." 710 F.2d 41, 46 (2d Cir. 1983) (emphasis added). Other cases have come to similar conclusions. *See Considine v. Board of County Comm'rs*, 910 F.2d 695, 699 (10th Cir. 1990) (determining that an employee's speech at a work meeting was protected under a *Pickering* analysis); *Piesco v. Koch*, 12 F.3d 332, 342 (2d Cir. 1993) (applying a balancing test to determine if an employee's speech during a work meeting with members of a legislative committee was protected); *Kingsville Ind. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (holding that a school teacher's course work on African Americans in American history was protected by the First Amendment); *Williams v. Kentucky*, 24 F.3d 1526, 1535 (6th Cir. 1994) (determining that a supervisor's routine evaluation of a subordinate was protected speech under the *Pickering* test).

Of course, the First Amendment rights accorded to public employees' duty-related speech, whether private

or non-private, are not unlimited. By the same token, however, because the First Amendment protects certain non-private speech in the course of public employment, the government's right to restrict that speech is also limited. Article XXVIII's fatal flaw is its wholesale *ex ante* ban on all non-English employee speech. It affects non-private communications between an employee and her supervisor, an employee and co-workers, and an employee and members of the public. It unlawfully affects both protected and unprotected speech. Article XXVIII is therefore unconstitutionally overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

C. Article XXVIII Violates Public Employees' Rights To Make Statements Upon Matters Of Public Concern.

This Court has held that the government may not dismiss a government employee or deny him a government benefit due to the exercise of speech where the employee's speech addresses a matter of public concern. *Pickering v. Board of Educ.*, 391 U.S. 563, 572-74 (1983). Certain subjects are inherently of public concern. For example, in *Givhan*, this Court held that when a public school teacher privately commented to the school principal that the district adopted racially discriminatory policies, her expressions warranted First Amendment protection. 439 U.S. at 415-16; *see also Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983) (characterizing Givhan's allegation regarding racial discrimination as "a matter inherently of public concern"). Courts have also identified the misuse of public funds, wastefulness, and inefficiency in managing government as matters of public concern. *Hamer v. Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987). Similarly, in *Czurlanis v. Albanese*, the Third Circuit held that a county employee had spoken on matters of public concern when he challenged the practices of the Division of

Motor Vehicles and county government, which he considered "inefficient, wasteful, and possibly fraudulent, and in some cases, made suggestions for correcting the problems." 721 F.2d 98, 104 (3d Cir. 1983).

Under Article XXVIII, a government officer or employee may be terminated for speaking a non-English language while performing government tasks or while commenting about any of the matters identified as inherently dealing with public concern. The undisputed facts establish that Kelly and other State employees used both English and non-English languages to convey information about matters of public and private concern. (Y.A. 6) Kelly, in particular, used a non-English language in conducting investigations and rendering the state's final determination to admit or deny monetary claims against the State by citizens whose principal or only language was not English. (Y.A. 6) Furthermore, she used non-English languages to interview people who made employment discrimination allegations against the State. (Y.A. 6) The claims Kelly processed, and the interviews she conducted involved allegations of abuse, inefficiency, discrimination, and incompetence. (J.A. 45-46) Such issues are of "vital interest" to the citizenry and, as a result, are constitutionally-protected. *See Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993). Article XXVIII improperly prohibits these communications in their entirety.

E. Article XXVIII Fails to Pass Any Balancing Test.

Any balancing test requires courts to analyze the State's interest in promoting efficiency. Kelly and the State submitted certain Stipulated Facts to the trial court regarding this very issue. The State agreed that Kelly's use of Spanish contributes both to the "efficient operation" and "efficient administration of the State." (Y.A. 6)

In addition, in its responses to Kelly's requests for admission, the State admitted that it has "no legitimate purpose in restricting" her from speaking Spanish while performing government business. (Y.A. 10)

An intervenor to a case takes the case as he finds it. *See United States v. California Coop. Canneries*, 279 U.S. 553, 556 (1929). Simply put, "[an intervenor] cannot change the issues framed between the original parties, and must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell." *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153 (S.D. Cal. 1954). Bound by the record, he cannot raise questions of fact on appeal that were conclusively resolved through a stipulation between the original parties. *Shender v. Zoning Bd. of Adjustment*, 131 A.2d 90, 91 (Pa. 1957) (determining that an intervenor was bound by a stipulation of facts because "he takes the suit as he finds it"); *see also Lane v. Ferguson*, 156 P.2d 236, 239-40 (Ariz. 1945) (holding that intervenors "should not and cannot be heard to complain that the parties in a going lawsuit" have stipulated to certain treatment in a case).

In this case, AOE was fully aware of the parties' stipulated facts and the State's responses to discovery. In fact, at the District Court hearing on AOE's Motion to Intervene, AOE's counsel stated: "We contemplate taking no further testimony whatsoever that would have any effect on anything that's gone before. We live with what's before this Court thus far." (J.A. 130) AOE may not now reject the record of this case. It is bound by the record established by the original parties.

Even without the State's admission that Kelly's use of Spanish contributed to governmental efficiency, the record is devoid of any evidence that non-English speech by State employees hinders the efficient operation of government in any manner. AOE has no interest whatsoever, much less a compelling interest, to place on the

scales to counter the weight of the constitutionally-protected interests of State employees and their potential audiences. As a result, Article XXVIII fails any balancing test.

1. AOE's Argument That the Government Has Substantial Interests in Protecting Itself from Non-English Languages Is Not Supported By The Record.

AOE argues that "government has substantial interests in protecting itself from the divisive effects of multilingualism." (Pet. Brf. 36) It claims that Article XXVIII fosters unity, encourages immigrants to learn English, protects English from erosion, and shields Arizona from linguistic discord. (J.A. 26-32; Pet. Brf. 17) None of these reasons is supported by fact or by the record of this case.

a. Article XXVIII Will Not Achieve Unity but Instead Will Isolate Language Minority Groups.

When a government declares that a single language is officially endorsed,[16] the result is anything but unifying. In reality, certain non-English-speaking groups become disfavored within society. As one scholar has explained:

> [o]ne's language is intimately associated with the individual; new languages are difficult to learn; and language is a particularly easy tool to use in political control. Therefore, when language policies establish boundaries between people and government the effects are likely to

[16] Article XXVIII, in fact, is much more than a declaration that English is the official language of Arizona. It requires the government and its employees – at all levels – to act in English "and in no other language."

> be quite significant: alienation, distancing, and political impotence. . . . Thus, language can be used not only to establish real boundaries but to communicate **attitudes** and **feelings** of government toward people as well.

William M. O'Barr, *Boundaries, Strategies, and Power Relations: Political Anthropology and Language* in *Language and Politics*, 414 (William M. O'Barr & Jean F. O'Barr ed. 1976) (emphasis in original). Even a mere symbolic enactment creates inequality between groups that are given – or not given – official sanction. When the government designates certain traits as "official," all persons lacking the official traits are relegated to second-class citizenship. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 368 (1992). While "official English laws" may indeed unify members of the English-speaking "inside," they disenfranchise citizens who are language "outsiders." The Ninth Circuit recognized this fact in its opinion when it stated that "the state cannot achieve unity by prescribing orthodoxy." (Pet. for Cert. 54a); *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) (stating that "[n]ational unity [is] an end which officials may foster by persuasion and example" but not by constitutional compulsion); *Meyer v. Nebraska*, 262 U.S. 390, 392 (1923) (finding that forced Americanization violates the American tradition of liberty and tolerance).

Recently, this Court recognized the importance of protecting minority groups from exclusion by the majority:

> [t]hese [constitutional] protections [are] taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors

that constitute ordinary civic life in a free society.

Romer v. Evans, 116 S. Ct. 1620 (1996). Polarizing language groups does not achieve unity[17] and it is unconstitutional on many levels. Article XXVIII, therefore, fails to achieve its stated goal.

b. Article XXVIII Is Not An Appropriate Vehicle For Encouraging Citizens To Learn English.

Ninety-eight percent of Hispanic parents believe it is "essential for children to read and write English perfectly." J. Crawford, *Bilingual Education: History, Politics, Theory and Practice* 60 (1989). Only 94 percent of Anglo parents feel the same. *Id.* Empirical evidence confirms that Spanish-speaking families are eager to learn English. Over three generations, Spanish-speaking families become English-speaking families. The first generation is primarily monolingual, the second generation is bilingual, and in the third generation English is the preferred language. McCarthy & Valdez, *Current and Future Effects of Mexican Immigration in California* 65 (1989). Monolingual Spanish-speakers continue to exist, not because immigrants refuse to learn English, but because continuing immigration ensures that there are always people in transition. C. Veltman, *The Future of the Spanish Language in the United States* 45 (1988).

Restricting non-English speakers' access to their government is not an appropriate method for encouraging them to learn English. Such a patronizing action is unwarranted and unlawful. *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996) (holding that the

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[17] *See* Leila S. Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 Wash. L. Rev. 285, 357-68 (1996).

First Amendment directs courts to be "especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good"). While the Ninth Circuit recognized the importance of encouraging a common language, it concluded "that Article XXVIII is [not] in any way a fair, effective, or appropriate means of promoting those interests." (Pet. for Cert. 54a)

c. English Is Not Threatened by the Government's Use of Non-English Languages.

AOE argues that the English language may be eroded by government's use of non-English languages. (Pet. Brf. 36-37; J.A. 26) Article XXVIII, it claims, will protect English from the threat of foreign tongues. AOE's stated concerns, however, are ill founded. There is no serious movement to make any non-English language the official language of Arizona or the United States. A. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, Harv. C. R.-C. L. L.Rev. 293, 321 (1989). In fact, quite the opposite is true. Non-English-speaking immigrants are shifting to English at an historically rapid pace. *Id.* at 322. These immigrant groups recognize that English is the language of commerce and economic opportunity. They understand that these benefits are not available to those who do not speak English. *Id.* at 321. Article XXVIII is unnecessary. Even assuming that its motivations are pure, it is designed to protect English from an enemy that simply does not exist.

d. Article XXVIII Will Not Protect Arizona from Discord.

To support the notion that English must be declared the official language, AOE and amici state that multilingual countries become divided over language. (Pet.

Brf. 36.) These countries' problems, however, may in fact stem from official language movements.

Canada is a prime example. In 1969, both English and French were declared the official languages of Canada. Five years later, in an attempt to control what it considered a threat from the English-speaking minority, a French-speaking provincial majority declared French the exclusive language of Quebec.[18] Maldoof, *Comment: A Canadian Perspective*, 60 Int'l J. Soc. Lang. 105, 110 (1986). The elevation of French led to more restrictive language laws and more divisiveness among the language groups in Quebec. *Id.* Canada's experience with official language movements suggests that divisiveness and discord are *more* likely when a single language is declared official. *Id.* In short, Article XXVIII may lead to the very divisiveness it professes to avoid.

IX. ARTICLE XXVIII UNCONSTITUTIONALLY IMPAIRS THE FIRST AMENDMENT RIGHTS OF RECIPIENTS.

The First Amendment right to communicate encompasses the right to communicate effectively. *Reeves v. McConn*, 631 F.2d 377, 382 (5th Cir. 1980). Consequently, "[t]he mere existence of an alternative means of expression . . . cannot by itself justify a restraint on some particular means that the speaker finds more effective." *Id.* Article XXVIII violates the First Amendment because it effectively bars certain intended recipients of communication from receiving the messages the speaker intends to

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[18] The Quebec law "was adopted in response to growing nationalist sentiment and a feeling that the French-speaking majority was threatened by the English-speaking minority and the strength of the English language and culture of North America." Maldoof, *Comment: A Canadian Perspective*, 60 Int'l J. Soc. Lang. 105, 111 (1986).

convey. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (holding that "where a speaker exists . . . [First Amendment] protection is afforded . . . to the communication, to its source and to its recipient both").

Article XXVIII precludes non-English speakers from exchanging any information with their government even if the government has the ability – through employees like Kelly – to receive and disseminate information at no additional cost to the government. The public's right to receive communication involving ideas and information has long been recognized to be a necessary corollary to enumerated First Amendment freedoms, including the right to assemble and petition for redress of grievances. As Justice Brennan observed in *Board of Education v. Pico*, taking counsel from James Madison, "[t]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom" 457 U.S. 853, 867 (1982) (emphasis in original); *see also Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (stating that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes . . . the right to receive . . . .") Article XXVIII's blanket prohibition violates the rights of non-English-speaking citizens who seek to communicate with their government. *Cf. Romer v. Evans*, 116 S. Ct. 1620 (1996) (stating that the "government and each of its parts [must] remain open on impartial terms to all who seek its assistance.") The Ninth Circuit correctly determined that it is unconstitutional.

X. IN ADDITION TO ITS FIRST AMENDMENT INFIRMITIES, ARTICLE XXVIII VIOLATES THE FOURTEENTH AMENDMENT.

In addition to her injuries under the First Amendment, Kelly's complaint alleged that Article XXVIII violates the Fourteenth Amendment. Although the lower courts did not directly address the Fourteenth Amendment, the courts' discussions of facts and law are relevant to a Fourteenth Amendment analysis.[19] This Court should undertake such an analysis if it reaches the merits of this case.

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[19] Substantial facts were adduced at the trial court level establishing, *inter alia*, the disparate impact of Article XXVIII on ethnic minorities. Neither the Ninth Circuit nor the District Court reached the equal protection issues Kelly raised. In his dissent from the Ninth Circuit opinion, however, Judge Kozinski recognized that additional proper grounds may exist for invalidating Article XXVIII:

> [t]his is not to say that Arizona's English-only policy is constitutional. As the majority and the concurrence point out, Article XXVIII makes it harder for many Arizonans to receive government services. A successful challenge might be raised by those whose ability to deal with their government is thereby impaired. Nor is the First Amendment the only basis on which the policy might be attacked; Yniguez also charges that the English-only policy violates equal protection and conflicts with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. No court has yet directly considered these arguments, which go more directly to the heart of the dispute.

(Pet. for Cert. 92a)

A. By Depriving Arizona Citizens of Their Pre-existing Communication Rights, Article XXVIII Violates the Fourteenth Amendment's Guarantee of Equal Protection.

Article XXVIII caused a major change in relations between Arizona citizens and their government. Prior to its adoption, Arizona government employees and officials were free to communicate with citizens in any language that the employees and citizens both understood. Although the State did not have an employment policy mandating that employees speak multiple languages, it employed workers who were generally representative of the Arizona populace and who were multi-lingual. In addition to English, some government employees spoke Native American languages while others spoke Spanish or other tongues. As a result, prior to Article XXVIII, citizens with limited or non-existent English language skills usually could find a government employee with whom they could effectively communicate.

Arizona's adoption of Article XXVIII severely limited the discourse between its citizens and their government. In fact, Article XXVIII targeted a minority of the Arizona population who lacked English language skills and prohibited them from communicating with their government, a government that had the ability to communicate with them at no cost or burden. The State is unable to articulate a reason why a State employee who speaks Spanish and English is free to communicate in English with English-speaking citizens yet is forbidden to communicate in Spanish with Spanish-speaking citizens. Indeed, Kelly's use of a non-English language fostered State efficiency and resulted in an exchange of information of interest to both the citizenry and the State itself. (J.A. 46)

Article XXVIII imposes a "broad and undifferentiated disability on a single [ ] group" of citizens, non-English

speakers. *See Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996). Its "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable with anything but animus toward the class that it affects." *Id.* Article XXVIII's effect is also contrary to "the principle that [the] government and each of its parts remain open on impartial terms to all who seek its assistance. 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' " *Id.* at 1628 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

Like the illegal amendment enacted by referendum in *Romer*, Article XXVIII is "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. '[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . . ' " *Id.* at 1629 (quoting *The Civil Rights Cases*, 109 U.S. 3, 24 (1883)). Because the law is "obviously intended chiefly to affect [the non-English speaking class] as distinguished from the rest of the community, [it] is a denial to them of the equal protection of the laws." *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926).

B. Article XXVIII Also Infringes on the Constitutional Notion of a Republican Form of Representative Government.

In addition to its other defects, Article XXVIII deprives Arizona citizens access to their government. This limitation on citizens is incompatible with the concept of a republican form of government.[20] Simply stated, Article XXVIII prohibits a subclass of society from communicating with their representatives and elected officials. This unconstitutionally inhibits citizen participation in the political process. *See Reynolds v. Sims*, 377 U.S. 533,

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[20] U.S. Const. Art. IV, § 4.

565 (1964) (declaring a state districting system unconstitutional under the Equal Protection Clause and stating that "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies"). Article XXVIII acts to deprive a small class of citizens of the full enjoyment of the Constitution's guarantee of participation in State government. More specifically, it deprives the subclass of a right which is enjoyed without restriction by all other citizens. It must be stricken.

CONCLUSION

Based on the foregoing, this Court is respectfully urged to vacate its order granting certiorari and dismiss the Petition for Writ of Certiorari. Alternatively, this Court is respectfully urged to affirm the *en banc* decision of the United States Court of Appeals for the Ninth Circuit. In addition, the Court is requested to award Respondent Maria-Kelly F. Yniguez her fees and costs and such other relief as the Court deems just and proper.

Respectfully submitted,

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July 26, 1996

APPENDIX

ARTICLE XXVIII ENGLISH AS THE OFFICIAL LANGUAGE

1. *English as the Official Language; Applicability.*

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3)(a) This Article applies to:

(i) the legislative, executive and judicial branches of government

(ii) all political subdivisions, departments, agencies, organizations, and instrumentatalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders, programs and policies.

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

2. *Requiring This State to Preserve, Protect and Enhance English.*

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve,

protect and enhance the role of the English language as the official language of the State of Arizona.

3. *Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.*

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as a part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

4. *Enforcement: Standing.*

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARIA-KELLY F. YNIGUEZ, Plaintiff, vs. ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERT K. CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona, Defendants.	**CIV NO. 88-1854 PHX PGR** **PLAINTIFF'S AND DEFENDANTS, STATEMENT OF STIPULATED FACTS**

The parties stipulate that in addition to the pleadings, other evidence and documents on file, the following facts are deemed uncontested and may be used by this Court as evidence subject only to relevancy objections:

* * *

3. Kelly is a State Service employee employed by the State of Arizona in the Risk Management Division of

the Department of Administration. She is an Insurance Claims Manager and, among other duties, manages medical malpractice claims asserted against the State of Arizona or physicians for whom the State provides insurance on a self-insurance basis. She has been so employed since 1984.

* * *

8. Kelly is bilingual, fluent and literate in both the Spanish and English languages. Spanish and English are Kelly's two natural languages. Kelly thinks in both languages and in the course of otherwise unimpeded conversation, naturally alternates between the two languages to appropriately express herself to persons who are able to understand her. She considers the Spanish language to be a part of her cultural heritage.

* * *

11. If Kelly issues an order denying, settling or approving a claim, she is governed by Article XXVIII and must act only in English.

* * *

13. In the prior course of acting for the State of Arizona as a State Service employee, Kelly spoke the English language to persons who speak only English, the Spanish language to persons who speak only Spanish, and a combination of the English and Spanish languages to persons who were able to communicate in both languages. Some of the persons with whom she communicated in a combination of the Spanish and English languages were persons whose command of the English

language was not sufficiently well-developed to understand all of the English language expressions and ideas which Kelly desired to communicate. Some of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly communicates in the Spanish language because the emotive ideas and feelings which she desired to express were, in her judgment and the exercise of her liberties, best and most clearly expressed in the Spanish language. In addition, Kelly communicated in the Spanish language to express otherwise inexpressible concepts and ideas.

14. In the course of acting for the State of Arizona as a State Service employee, Kelly has drafted legal settlement documents in both the English and Spanish languages to enable persons who were unable to understand the English language to comprehend the legal import of the document they were signing. She also communicated in the Spanish language pertaining to matters of public interest and importance. Kelly has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern.

15. Maria-Kelly F. Yniguez' use of a language other than English in the course of her performing government business contributes to the efficient operation of the State and to the efficient administration of the State.

16. The efficient operation of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English where the citizens are not proficient in English.

17. The efficient administration of the state is enhanced by permitting State service employees to communicate with citizens of the state in languages other than English where the citizens are not proficient in English.

* * *

20. The State of Arizona has adopted specific standards governing the conduct of State Service employees, violation of which "is cause for discipline or dismissal of a State Service employee." Some of these standards are embodied in Arizona's Administrative Rules and Regulations, including A.C.R.R. R2-5-501.

21. Employees of the State of Arizona who fail to obey the laws of the State of Arizona may be subjected to discipline or dismissal.

22. The regulations of the State of Arizona which require State service employees to comply with State laws and regulations require compliance with the Constitution of the State of Arizona as a part of the laws of the State.

23. The Director of the Department of Administration, Catherine Eden, is responsible, directly or indirectly through persons appointed by the Director, for the enforcement of personnel rules of the State of Arizona.

24. The Department of Administration has the power to impose employment sanctions on Kelly if, in the Department's opinion, she has violated a law, including Article XXVIII.

25. Maria-Kelly F. Yniguez is required by her employer to obey the Constitution and laws of the State of Arizona.

26. Maria-Kelly F. Yniguez is required by her employer to bear true faith and allegiance to the Constitution and laws of the State of Arizona.

27. Under its personnel rules, the State of Arizona has disciplined employees who failed to comply with the laws of the State of Arizona.

28. Under its personnel rules, the State of Arizona has dismissed employees for their failure to comply with the laws of the State of Arizona.

29. The State of Arizona intends, under its personnel rules, to continue to discipline employees who fail to comply with the laws of the State of Arizona.

30. The State of Arizona intends, under its personnel rules, to continue to dismiss employees who fail to comply with the laws of the State of the State of Arizona.

* * *

36. Governor Mofford expects State service employees to comply with Article XXVIII.

* * *

Robert J. Pohlman, State Bar No. 004601
Stephen G. Montoya, State Bar No. 011791
BONN & POHLMAN, CHARTERED
805 North Second Street
Phoenix, Arizona 85004
(602) 254-5557
Attorneys for the Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARIA-KELLY F. YNIGUEZ, Plaintiff, vs. ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERT K. CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona, Defendants.	**CIV NO. 88-1854 PHX PGR** **ANSWERS TO PLAINTIFF'S FIRST SET OF NON-UNIFORM INTERROGATORIES AND REQUESTS FOR ADMISSION**

To: Defendants Rose Mofford, Robert K. Corbin and Catherine Eden and their attorney, Robert K. Corbin, Attorney General and Anthony Ching, Solicitor General

Pursuant to Rules 26, 33 and 36, *Fed.R.Civ.P.*, Plaintiff requests that Defendants answer in writing and under oath, within thirty (30) days from the date of service hereof, or within such other time as may be ordered by

the Court, the following non-uniform interrogatories and requests for admissions:

* * *

REQUEST FOR ADMISSION NO. 18: Admit that the State of Arizona has no legitimate purpose in restricting Maria-Kelly F. Yniguez from using the Spanish language in the course of her performing government business.

Admit.

CIVIL MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

DATE: December 21 1988

PLACE: Phoenix, Arizona Judge Nr: 7017

Deputy Clerk: Meredith Ingle

Reporter: Jean Moll

CIV-88-1854 PHX PGR
Maria-Kelly F. Yniguez **vs.** State of Arizona et al

(Plaintiff) **(Defendant)**

DOCKET NUMBER **/ / Contd on reverse**

MATTER ON FOR HEARING

6 Deft State of Arizona's motion to dismiss for lack of jurisdiction

---

APPEARANCES **/ / Contd on reverse**

Robert James Pohlman and Stephen G. Montoya for pltf

Anthony B. Ching for deft State of Arizona

MINUTES **/ / Contd on reverse**

Deft's objection to the filing of supplemental response and motion to strike: IT IS ORDERED permitting the

filing of pltf's supplemental response and denying the State's motion to strike and permitting limited argument on the Article III case in controversy insofar as it applies to the 11th Amendment objections.

Deft State of Arizona's motion to dismiss for lack of jurisdiction (6): The Court finds the complaint on its face withstands the motion to dismiss except as to the nominal defendant, State of Arizona. IT IS ORDERED granting the motion as to the State of Arizona.

The Court emphasizes this is a preliminary ruling by this Court. The issue will appear again under the briefing schedule on the subsequent motions.

(Counsel did not file an original motion for leave to file a supplemental response; this was done on oral motion at the hearing.)

/ / **Under Advisement** / / **Notice to Counsel**
/ / **Vacated** **Contd to:** _____

DOCKETED BY:

/s/ Shirley Dorfman
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MARIA KELLY F. YNIGUEZ,	)	Case No. CIV 88-1854-PHX-PGR
Plaintiff,	)	Phoenix, Arizona
vs.	)	Monday, February 13, 1989
STATE OF ARIZONA, et al.,	)	Plaintiff's Motion for Preliminary Injunction and Order to Show Cause.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff:
ROBERT JAMES POHLMAN
Bonn & Pohlman
805 North 2nd Street
Phoenix, AZ 85004
(602) 254-5557

For Defendants:
ANTHONY B. CHING
Attorney General's Office
1275 W. Washington
Phoenix, AZ 85007
(602) 542-3333

Court Recorder:
ROBERTA A. HIGHTOWER
U.S. District Court
230 N. 1st Avenue, Room 1400
Phoenix, AZ 85025
(602) 261-3857

Transcription Service:
V/ARS, Inc.
1300 T Street
Sacramento, CA 95814
(916) 448-2457

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[p. 58, ll. 8-25] Yniguez – Direct

Q Have you personally taken any action as a result of Proposition 106?

A Yes. I don't speak Spanish in the work place.

Q And why is that?

A I don't speak Spanish in the performance of my job.

Q And why is that?

A Because I fear that I would be – it would be contrary to the amendment. I fear that someone could bring a lawsuit against me.

Q Have you had any indication that anyone in the general public is disconcerted with your action?

A Oh, definitely, I've got a few letters I could show you.

Q Have you had occasion to be involved with the disciplinary process at the State of Arizona?

A Yes, I have.

Q In what way?

A I had an employee that worked for me.

[p. 59, ll. 1-25] Q What was the contact that you had with the disciplinary process?

A In essence, we had some problems with the following of certain rules and regulations, and ultimately, that was resolved with a resignation.

Q Do you have any fear that you may undergo employment sanctions if you speak Spanish in the work place?

A Yes.

Q What's that based on?

A That's based on the fact that if I am charged with the – by the loyalty oath, and the rules of the Department of Administration that I should not, I could be disciplined or terminated for breaking any law, constitutional or statute, any state law, and discipline or dismissal is something that is possible.

Q Kelly, since the time that Proposition 106 was passed, and it was enacted as Article 28, has anyone told you that you should continue business as usual and speak Spanish?

A No.

Q Do you feel you can?

A No.

Q Why not?

A I feel I can't because I would be breaking the law as it now exists, and I would be setting myself up for a possible lawsuit and possible disciplinary action.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARIA-KELLY F. YNIGUEZ, et al., Plaintiff,	No. CIV-88-1854-PHX-PGR
STATE OF ARIZONA, et al., Defendant.	Phoenix, Arizona April 27, 1989 9:33 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
DEFENDANTS' MOTION TO DISMISS

APPEARANCES:

For the Plaintiffs:
Pohlman & Sanders, P.A.
By: ROBERT J. POHLMAN, Esq.
2525 E. AZ Biltmore Cir., #220
Phoenix, Arizona 85016

For the Defendants:
Office of the attorney general
By: ANTHONY B. CHING, Esq.
1275 W. Washington
Phoenix, Arizona 85007-2997

Court Reporter:
William A. Mc Nutt, III, RPR
230 N. First Ave., Room 7404
Phoenix, Arizona 85025
(602) 253-0707

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

(p. 4, ll. 9-24) MR. CHING: Okay. In regard to number two, number two was necessitated because in the cross-examination of Ms. Yniguez the last time, at Page 67 and 68 of the transcript, Miss Yniguez testified that the settlement releases in the files concerning those claims that she worked on had releases in Spanish only, and that there was no English version of it. The question by me was:

"QUESTION: Okay. And is there also an English version of it on file?

"Answer: No."

What happened after that is that Miss Yniquez has had the opportunity to look at files and refresh her memory and discovered that that statement was incorrect.

THE COURT: Very well. Stipulation is accepted. (MARIA-KELLY F. YNIGUEZ, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN)

* * *

(p. 11, ll. 16-17) REDIRECT EXAMINATION

BY MR. POHLMAN:

* * *

(p. 12, ll. 7-22) Q. And the communication of the governmental act of settling the claim is communicated between claimant in what manner?

A. It can be communicated verbally, in whatever language the claimant understands.

Q. Can – how about the way of document?

A. I can also communicate it by letter. I can communicate it verbally.

Q. The files that Mr. Ching had you look at after the last hearing, was there a file in which there was a release in Spanish that was signed?

A. Yes. There was one file in which the release, the signed document was in Spanish. I did provide a translation of that document and placed it in the file so that anyone that had to look at the file for whatever reason and was not able to read the Spanish version could know what was contained within. The signed document was in Spanish.

* * *

(p. 15, ll. 7-17) MR. CHING: . . . The fact is that the witness gave us three files, and in one of which there is a Spanish version which is not - which is signed and an English version unsigned, but it's there. But in the other two files they were signed versions as to both languages.

THE COURT: I think that's what the Court understands from the testimony and from the stipulation, the only difference being that as I understand the plaintiff's testimony, she prepared the English translation of the Spanish settlement document and placed it in the file so that there would clearly be an English translation.

* * *

GUST, ROSENFELD & HENDERSON
3300 Valley Bank Center
201 North Central Avenue
Phoenix, Arizona 85073-3300
(601) 257-7422
James F. Henderson – 000454

Attorneys for Intervenors/Appellants Robert D. Park; Arizonans for Official English

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA-KELLY F. YNIGUEZ, JAIME P. GUTIERREZ, Plaintiffs,	)	No. 90-15546 D.C. No. CV-88-1854-PGR
v.	)	MOTION TO RECALL MANDATE
STATE OF ARIZONA, Defendant/Appellee.	)	
ROBERT D. PARKS; ARIZONANS FOR OFFICIAL ENGLISH, Applicants in Intervention/ Appellants.	)	

MARIA-KELLY F. YNIGUEZ; JAIME P. GUTIERREZ,

Plaintiffs-Appellees.

v.

ROSE MOFFORD, individually and as Governor of the State of Arizona; ROBERT CORBIN, individually and as Attorney General of the State of Arizona,

Defendants-Appellants.

No. 90-15581

D.C. No. CV-88-1854-PGR

ROBERT D. PARKS; ARIZONANS FOR OFFICIAL ENGLISH,

Applicants in Intervention-Appellees.

Intervenors/appellants Robert D. Park and Arizonans for Official English move the Court for an Order recalling the Mandate issued herein on August 14, 1991. Recall is sought on the ground it was erroneously issued, contrary to the court's decision which specifically stated. "We shall retain jurisdiction over the appeal of the district court's decision on the merits," as more particularly shown in the attached Memorandum of Points and Authorities which by reference is incorporated herein.

Dated this 18th day of September, 1991.

GUST, ROSENFELD & HENDERSON

By _____
James F. Henderson
Attorneys for
Intervenors/Appellants
Robert D. Park and
Arizonans for Official
English

MEMORANDUM OF POINTS AND AUTHORITIES

This matter was argued and submitted December 14, 1990.

The Court's Opinion was filed on July 19, 1991. It reversed the District Court's denial of the intervention motion of Arizonans for Official English and Robert D. Park. It also permitted the Arizona Attorney General to make argument as to the constitutionality of Article XXVIII to the Constitution of the State of Arizona pursuant to 28 U.S.C. § 2403(b).

The Court's Opinion concluded with the statement:

> We shall retain jurisdiction over the appeal of the district court's decision on the merits.

On July 31, 1991, counsel for intervenors/appellants addressed a letter to the Clerk of the Court in reference to that statement. It was sent to identify the specific procedures to be followed in view of the Court's retention of jurisdiction. No response has been received to date (see Exhibit 1 hereto).

Counsel for intervenors/appellants relied upon the Court's specific direction that it would retain jurisdiction and have awaited further direction as to scheduling and briefing.

Contrary to the Court's specific retention of jurisdiction, Mandate was issued herein on August 14, 1991 (see Exhibit 2 hereto).

Subsequent telephone inquiries to the Clerk's office have not been productive of clarification in view of the issue of Mandate.

The Court has inherent power to protect the integrity of its own processes and can recall the Mandate. *Briggs v. Pennsylvania R. Co.*, 68 S. Ct. 1039, 334 U.S. 304, 92 L. Ed. 1403 (1948); *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988); *Watson v. Estelle*, 859 F.2d 105, 886 F.2d 1093, 1094 (9th Cir. 1988); *ASTA of California, Inc.*, 754 F.2d 1394, 1395 (9th Cir. 1985); *Verilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977); *Perkins v. Standard Oil Co. of California*, 487 F.2d 672, 674 (9th Cir. 1973).

The power to recall a Mandate is sparingly exercised but is appropriate under the special circumstances present here in order to both prevent injustice and to correct the mistake under which the Mandate was issued.

Intervenors/appellants ask the Court recall the Mandate issued herein so the matter may proceed on the merits.

Respectfully submitted this 18th day of September, 1991.

GUST, ROSENFELD &
HENDERSON

By _____
James F. Henderson
Attorneys for
Intervenors/Appellants
Robert D. Park and
Arizonans for Official
English

CERTIFICATE OF SERVICE

I, JAMES F. HENDERSON, attorney for Intervenors/Appellants Robert D. Park and Arizonans for Official English, hereby affirm that one (1) copy of Intervenors/Appellants Motion to Recall Mandate was mailed this 18th day of September, 1991, to each of the following:

Mr. Grant Woods
Attorney General
Ms. Rebecca W. Berch
Solicitor General
1275 West Washington Street
Phoenix, Arizona 85007
Attorneys for Defendant/Appellant
State of Arizona and Robert K. Corbin

Mr. Robert J. Pohlman
Ryley, Carlock & Applewhite
Suite 2600
101 North First Avenue
Phoenix, Arizona 85003-1973
Attorneys for Plaintiff/Appellee
Maria-Kelly F. Yniguez

_____
James F. Henderson

EXHIBIT 1

LAW OFFICES OF
GUST, ROSENFELD & HENDERSON

Reply to Phoenix Office

3300 Valley Bank Center
201 North Central Avenue
Phoenix, Arizona
85073-3300
(602) 257-7422
Telecopier: (602) 254-4878

Tucson Office
1660 Security Pacific Bank Plaza
33 North Stone Avenue
Tucson, Arizona
85701-1413
(602) 628-7070
Telecopier: (602) 624-3849

July 31, 1991

Ms. Cathy A. Catterson, Clerk
United States Court of Appeals
Ninth Circuit
Post Office Box 549
San Francisco, CA 94101

Re: Maria-Kelly F. Yniguez, et al., v. State of Arizona
Docket Nos. 90-15526 and 90-15581 Our File No. 010604-00004

Dear Ms. Catterson:

We acknowledge receipt of the court's opinion filed July 19, 1991 in the above matter. That opinion reversed a trial court decision and permitted Robert D. Park and Arizonans for Official English to intervene in the action.

The last sentence of the opinion states that "We shall retain jurisdiction over the appeal of the District Court's decision on the merits."

It is our understanding the court intends to proceed on the merits without sending the matter back to the District Court first. If this understanding is correct, we assume we will receive a briefing schedule following the date on which a mandate normally issues.

Would you please clarify the court's intention and advise if our understanding is correct.

Thank you for your aid and courtesies in this matter.

Yours very truly,

James F. Henderson
For the Firm

cc: Mr. Robert J. Pohlman
Mr. Anthony B. Ching
Mr. Robert D. Park

EXHIBIT 2

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
50 U.N. Plaza, Rm. 59
San Francisco, CA 94102-4909

August 14, 1991

USDC, Phoenix
District of Arizona (Phoenix)
U.S. Courthouse
230 N. First Ave.
Room 1400
Phoenix, AZ 85025

C.A. NO. TITLE	AGENCY/ D.C. NO.
90-15546 Yniguez v. State of Arizona	CV-88-1854-PGR
90-15581 Yniguez v. Mofford	CV-88-1854-PGR

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter.

[x] Certified copy of the Decree of the Court

[ ] Judgment of the National Labor Relations Board

[ ] Certified copy of the Entry of Dismissal;

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Sylvia McAlister
Deputy Clerk

Enclosure(s)
All counsel, without enclosures

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA-KELLEY F. YNIGUEZ; JAIME P. GUTIERREZ,

Plaintiff/Appellees,

and

ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

Intervenors/Plaintiffs-Appellees

and

STATE OF ARIZONA; ROSE MOFFORD; ROBERT CORBIN, et al.,

Defendants-Appellees.

v.

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARKS,

Intervenors-Defendants-Appellants.

No. 92-17087

D.C. No.
CIV 88-01854-PGR

MOTION TO MODIFY OPINION

MARIA-KELLEY F. YNIGUEZ,

Plaintiff-Appellee,

v.

STATE OF ARIZONA; ROSE MOFFORD, ROBERT CORBIN, et al.,

Defendants-Appellants.

and

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARKS,

Intervenors-Defendants-Appellants.

No. 93-15061

MARIA-KELLEY F. YNIGUEZ;

Plaintiff/Appellee

v.

STATE OF ARIZONA; ROSE MOFFORD; ROBERT CORBIN, et al.,

Defendants-Appellants.

No. 93-15719

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

(NO. CV88-1854-PGR)

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, cross-appellees State parties respectfully

request the Court to modify Section IV of its Opinion in *Yniguez v. State*, Nos. 92-17087, 93-15061, and 93-15719, Slip Op. at 15145 (9th Cir. Dec. 7, 1994) by adding the following footnote after the first sentence in Section IV:

> **Footnote No. 28a** The State of Arizona expressly waived its right to assert the Eleventh Amendment as a defense to the award of nominal damages.

This request for modification of the opinion is supported by the attached letter from the Attorney General of the State of Arizona to Mr. Robert Pohlman, counsel for Plaintiff Yniguez, expressly waiving the State's Eleventh Amendment immunity from the award of nominal damages.

The modification is requested because, without the waiver, this Court lacks jurisdiction to award nominal damages against the State of Arizona or the Governor of Arizona acting in his or her official capacity. *See Draper v. Coombs*, 792 F.2d 915, 918 (9th Cir. 1986). The State parties thus wish to clarify that the Court's opinion does not authorize an award of nominal damages against the state or a state official acting in his official capacity absent an express waiver.

DATED this 20th day of December, 1994.

GRANT WOODS
Attorney General

/s/ Paula S. Bickett
PAULA S. BICKETT
Acting Solicitor General
1275 West Washington Street
Phoenix, Arizona 85007
Telephone No. (602) 542-3333

Attorneys for State Parties

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 1994, I served the foregoing Motion to Modify Opinion upon the Plaintiff-Appellees, Intervenors-Defendants-Appellants, and Intervenor-Appellee through their attorneys, by mailing two copies of the same, postage prepaid, to the following addresses:

Robert J. Pohlman, Esq.
Ryley, Carlock & Applewhite, P.A.
101 North First Avenue, Suite 2700
Phoenix, Arizona 85003-1973

Stephen G. Montoya
Bryan Cave
2800 North Central, 21st Floor
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Attorneys for Plaintiff-Appellee Yniguez

Barnaby W. Zall
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Scult, French & Zwillinger, P.A.
P.O. Box 870
Phoenix, Arizona 85001-0870

Attorneys for Intervenors-Appellants

/s/ Paula S. Bickett
PAULA S. BICKETT

(LOGO)

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

1275 West Washington, Phoenix 85007-2928

GRANT WOODS
ATTORNEY GENERAL

Main Phone: 542-5025
Telecopier: 542-4085

December 20, 1994

Robert J. Pohlman, Esq.
Ryley, Carlock & Applewhite, P.A.
101 North First Avenue, Suite 2700
Phoenix, Arizona 85003-1973

Re: *Yniguez v. State*
(Nos. 92-17087, 93-15061, 93-15719)

Dear Mr. Pohlman:

I am writing to notify you that the State of Arizona waives its right to assert its Eleventh Amendment immunity from the award of nominal damages in *Yniguez v. State*.

Sincerely,

/s/ Grant Woods
Grant Woods
Attorney General

cc: James F. Henderson
Barnaby W. Zall
Stephen G. Montoya